IN THE NATIONAL ANTI-DOPING PANEL

BETWEEN:

UK Anti-Doping ***Anti-Doping Organisation***

~and~

Mark Dry ***Respondent***

THE SKELETON OF THE RESPONDENT'S ARGUMENT

Counsel for the Respondent will argue against the Points of Claim and submit:

1. This case stems from a single, alleged "missed test"[1] by the Respondent on 15 October 2018, who was a member of UKAD's *Domestic Testing Pool ("DTP").* The Respondent has been charged with a violation of Article 2.5 of the IAAF Anti-Doping Rules. This charge sets forth the violation of *"tampering"*, which must be read in connection with the WADA Code definition of tampering to interpret its intended scope and identify the elements of the violation.
   Art. 2.5 IAAF ADR
   See also Art. 2.5, WADA Code

2. Just as significant as the Respondent's charge is, what the Respondent has not been charged with, which is *any other* anti-doping rule violation, be it either Art. 2.1 [Presence of a Prohibited Substance or its Metabolites or Makers in an Athlete's Sample]; 2.2 [Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method]; 2.3 [Evading, Refusing, or Failing to Submit to Sample Collection]; 2.4 [Whereabouts Failures]; 2.6 [Possession of a Prohibited Substance or a Prohibited Method]; 2.7 [Trafficking or Attempted Trafficking]; 2.8 [Administration or Attempted Administration]; 2.9 [Complicity]; or, 2.10 [Prohibited Association].
   Arts. 2.1-2.10 IAAF ADR

3. The difference between the *DTP* and the *Registered Testing Pool ("RTP")* is clear: if an Athlete in a tier below the *RTP* fails to comply with the whereabouts requirements applicable to his tier of Athletes, the IF or NADO in question should consider moving the Athlete up to the *RTP*. Furthermore, the *ISTI* and the WADA Code are clear that the consequences for whereabouts failures (Art. 2.4) can only be applied to athletes in the *RTP*. Therefore, the only possible outcome that could have resulted from the 15 October 2018 testing attempt was that the Respondent be moved into the IAAF/UKAD *RTP*.
   Comment to Art. 4.8.3 of the ISTI
   WADA Code Art. 2.4

[1] In reality, it is a misnomer to call the 15 October 2018 testing attempt a "missed test, "a "filing failure," or a "whereabouts failure," because the Respondent was not in a Registered Testing Pool. See par. 3 below.

4. Art. 2.5 of the IAAF Anti-Doping Rules prohibits conduct that *"subverts the Doping Control process"*; and specifically defines *"tampering"* as follows: *"intentionally interfering or attempting to interfere with a Doping Control official. Providing fraudulent information to an Anti-Doping Organization or intimidating or attempting to intimidate a potential witness."* Art. 2.5 must be interpreted in a manner that does not conflict with the requirements of due process, procedural fairness, or natural justice. In the premises, it is respectfully submitted that the Regulator must not ignore its rules and it must not interpret them in such manner that would lead to an error of law and injustice. In the event of a conflict, rules must be interpreted *contra preferentem* against the party who drafted them.
   CAS 2015/O/4128 IAAF v. Jeptoo
   CAS 2013/A/3080 Bekele Degfa v. TAF & IAAF
   R v. BBA, ex. P Mickan 17 March 1981, unreported, CA at p. 5 at of Lexis transcript
   CNOSF, BOA, USOC v FEI and NOCG CAS OG Athens 04/008;
   Beckie Scott and COC v IOC CAS 2002/O/373;
   Tsagev v JWF CAS OG Sydney 2000/010.

5. The threshold for finding tampering against the person charged is quite high. Furthermore, in this case, had the Respondent simply remained silent and not talked to UKAD at all, there would be no anti-doping rule violation at all, because the 15 October 2018 test attempt itself could not have been considered an anti-doping rule violation.
   IAAF ADR Art. 2.5
   Comment to Art. 4.8.3 of the ISTI
   CAS 2015/O/4128 IAAF v. Jeptoo

6. Regardless, the Respondent is not guilty of tampering because his conduct does not meet the strict standards set forth in Art. 2.5.

    a. First, the Respondent has not engaged in *"conduct which subverts the Doping Control process,"* because the conduct at issue for which he has been charged (which occurred on 18 October 2018 and 24 October 2018 according to the Amended Notice of Charge) was unconnected with any *Doping Control* process as the term is defined in the Code. The 18 October 2018 and 24 October 2018 conduct was (i) unrelated to the test distribution planning process[2]; (ii) unrelated to the *"provision of whereabouts information"*[3]; (iii) unrelated to any sample collection or handling[4]; (iv) unrelated to any laboratory analysis; (v) unrelated to TUE's; (vi) unrelated to results management[5]; and (vii) unrelated to a hearing[6].

[2] UKAD did not plan any test based on the information that was provided to it in the communications on 18 October 2018 or 24 October 2018.
[3] It is submitted that had the Respondent listed a location for 15 October 2018 that he knew was false, the provision of that information could arguably have been fraudulent. However, the subsequent answer that was voluntarily provided as to why the Respondent was not at the location indicated in his whereabouts for 15 October 2018 is not the same as the reason that the location was listed in the first place. Stated another way, unless UKAD could prove that the Respondent knew that he would not be at his residence on 15 October *at the time that he designated that as his location* – which is not even alleged – then his provision of that information could not have been fraudulent.
[4] Because no sample was collected or handled on 15 October (or on 18 October or 24 October for that matter), the communications on 18 October 2018 and 24 October 2018 were unrelated to any sample collection or handling.
[5] The communications on 18 October 2018 and 24 October 2018 were not related to any results management, for the simple reason that there could have been no results management related to the 15 October 2018 test attempt.
[6] The communications on 18 October 2018 and 24 October 2018 were not related to any hearing.

b. Second, the Respondent's 18 October 2018 and 24 October 2018 communications with UKAD did not amount to providing fraudulent information. *"Providing fraudulent information to an Anti-Doping organization"* can only reasonably be read to mean providing fraudulent information in relation to a results management process; otherwise, intentionally providing false whereabouts information could be considered tampering instead of just a whereabouts failure. Here, The UKAD inquiry was not in relation to a results management process, therefore the Respondent's response cannot be considered tampering.
c. Third, the Respondent lacked the intent to commit an anti-doping rule violation, and he quickly retracted the information provided to UKAD. The *"proper administration of justice"* was not jeopardized, because there could have been no consequence from the failed 15 October 2018 test attempt other than the possible future inclusion of the Respondent in the RTP. Likewise, the communications on 18 October 2018 and 24 October 2018 could not have been *"designed to influence the outcome of the proceedings in [the Respondent's] favour,"* because no *"proceedings"* could have been instituted as a result of the failed 15 October 2018 test attempt. Finally, the principles of *honesty*, *truthfulness* and *good faith* have been observed by the Respondent coming forward and are requirements consistently cited by CAS: penalizing the Respondent under the circumstances – where he corrected his misstatement quickly and in circumstances where UKAD could not have instituted *any* proceedings against him as a result of the failed 15 October 2018 test attempt – would send a strong, negative message to athletes.

IAAF ADR Art. 2.5
Comment to Art. 4.8.3 of the ISTI
CAS 2015/O/4128 IAAF v. Jeptoo
CAS 2016/A/4700 WADA v. Fedoriva
CAS OG 06/001 WADA v USADA, USBSF & Lund
CAS OG 2012/07 ICF & Starba & COC & IOC

7. Were a violation of Art. 2.5 to be found by the Tribunal, the starting sanction is 4 years, unless the athlete can prove that the violation was unintentional (in which case the starting sanction is two years). In the case of the Respondent, he could not have intentionally violated the anti-doping rules, because he had no knowledge that his 18 October 2018 and 24 October 2018 conduct could have constituted an anti-doping rule violation.
IAAF ADR Art. 2.5
Comment to Art. 4.8.3 of the ISTI
CAS 2016/A/4700 WADA v. Fedoriva

8. Under the IAAF ADR, where Art. 10.5.1 is inapplicable, if an athlete can establish that there was No Significant Fault or Negligence, his starting sanction may be reduced up to half of the otherwise applicable sanction length. Therefore, in the extraordinary circumstances that this Tribunal does find a violation, the Respondent is eligible for a reduction in his sanction based on the lack of significant fault or negligence:
    a. The Respondent was under physical, emotional, and cognitive duress as a result of the medication that he was taking.
    b. UKAD induced the Respondent to provide an explanation, even though he was under no obligation to do so.
    c. The Respondent exhibited poor judgment in providing a panicked response and asking his partner to confirm as much.
    d. Upon regret of his decision to do so, the Respondent quickly notified UKAD, apologized, and fully cooperated with UKAD's investigation.

WADA Code Art. 10.5.2
WADA Code Art. 10.5.2
CAS 2013/A/3327 Cilic v. ITF
CAS 2016/A/4371 Lea v. USADA

9. Under the principles of proportionality, which have been well documented by the CAS, the Respondent's conduct does not warrant a period of ineligibility of either 4 or 2 years.
CAS 2006/A/1025 Puerta v. ITF
CAS A4/2016 Klein v. ASADA
CAS 2005/A/830 Squizzato v. FINA
TAS 2007/A/1252 FINA v. Mellouli
2010/A/2268 Walilko v. Federation Internationale de l'Automobile

The Respondent will respectfully request that the Points of Claim be rejected, and the Tribunal find that the Respondent did not commit a violation of IAAF ADR Art. 2.5. Alternatively, it is submitted that the applicable sanction, should a violation be found, should be reduced.

(Dr.) Gregory I. Ioannidis; and,
Howard L. Jacobs, Esq.
For the Respondent
Submitted on the 13th of September 2019

RESPONDENT'S LIST OF AUTHORITIES

CASES:

CAS 2015/O/4128 IAAF v. Jeptoo

CAS 2013/A/3080 Bekele Degfa v. TAF & IAAF

CAS 2016/A/4700 WADA v. Fedoriva

CAS OG 06/001 WADA v USADA, USBSF & Lund

CAS OG 2012/07 ICF & Starba & COC & IOC

CAS 2013/A/3327 Cilic v. ITF

CAS 2016/A/4371 Lea v. USADA

CAS 2006/A/1025 Puerta v. ITF

CAS A4/2016 Klein v. ASADA

CAS 2005/A/830 Squizzato v. FINA

TAS 2007/A/1252 FINA v. Mellouli

CAS 2010/A/2268 Walilko v. Federation Internationale de l'Automobile

R v. BBA, ex. P Mickan 17 March 1981, unreported, CA at p. 5 at of Lexis transcript

CAS OG Athens 04/008 CNOSF, BOA, USOC v FEI and NOCG

CAS 2002/O/373 Beckie Scott and COC v IOC

CAS OG Sydney 2000/010Tsagev v JWF CAS OG Sydney

STATUTORY INSTRUMENTS:

IAAF Anti-Doping Rules Art. 2.5

WADA Code Art. 10.5.2

Comment to Article 2.5, WADA Code

Comment to Art. 4.8.3 of the ISTI